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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

S. NATHAN & COMPANY, INC.,
NEW HAMPSHIRE FIRE INSURANCE COMPANY,
Petitioners,
v.
RED CAB, INCORPORATED,
FRANK BIRD TRANSFER COMPANY,
Respondents.
No. 215.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

Respondents in their brief make the following misstatements of fact:

(a) On page 2 in their Statement of the Case, and again on page 7 in their Argument, respondents state that the receipt given by respondents to Teichlauf, represent-

ative of petitioner S. Nathan & Company, Inc., upon the payment of the charge for the transportation of the trunk to be carried, was labeled "baggage."

An examination of the record will disclose that there is no finding and no evidence to that effect. The receipt definitely was not so labeled. (R. 18.)

The word "baggage" does not appear upon such receipt (R. 18) excepting as a part of the symbol of the name and telephone number of respondents.

(b) On page 7 of their brief, in their Argument, respondents say that the District Court found that respondents reasonably believed that they were transporting a trunk containing ordinary baggage. An examination of the record will disclose that there is no such finding nor any evidence to that effect. (R. 16, 52, 53, 84.)

(c) At page 15 of their brief, respondents say that the District Court made the finding that the respondents were misled by the conduct of Teichlauf, the salesman for petitioner S. Nathan & Company, Inc. Such statement by the respondents is not sustained by the record. There was no such finding.

The appearance of the trunk to be carried was not considered or relied on by the respondents, since the agreement to carry the trunk was concluded without any observation or inspection of the trunk. (R. 52, 53.)

The evidence and the findings alike show that the respondents agreed to carry the trunk identified solely by the claim check for a trunk, which claim check was delivered to respondents with the request that respondents transport the trunk identified by such claim check, and which they agreed so to transport. (R. 52.)

The undisputed evidence is that the respondents do not make inquiry of a shipper and never inspect a trunk to ascertain the value of its contents (R. 52, 53), and the agent of respondents, who contracted for them to carry this trunk, testified that he never at any time refused to transport any trunk or sample case from the Union Station to the hotels. (R. 54.)

(d) Respondents at page 7 of their brief state that the parties at the time of the trial stipulated that "the business" of the respondents was the transporting to and from the Union Station at Indianapolis of what is commonly known as baggage. Instead it was stipulated that the respondents were "engaged in the business" of transporting baggage for hire to and from such Station for the public generally.

It was not stipulated that the business of the respondents was *limited* to the transporting of what is commonly known as baggage, nor was it stipulated that the business of the respondents was the transporting of baggage *as an incident to the transportation of passengers;* nor was there any finding by the court that the business of the respondents was that of transporting baggage, in the passenger-carrier sense, nor any finding that the trunk in question was being transported as baggage or as an incident to the transportation of a passenger.

It was stipulated by the parties that "each and any of the parties hereto should have the right, upon the trial, to introduce any additional competent, relevant and material evidence not in contradiction of anything herein stipulated." The additional uncontradicted evidence (of the Secretary and Treasurer of respondents) was that the respondents were engaged also in the business of trans-

porting trunks and sample cases of commercial travelers. (R. 52-54.) The additional uncontroverted evidence indisputably shows that the trunk here was being carried by respondents in pursuance of a contract expressly for its carriage, and not as an incident to the transportation of a passenger. (R. 22, 39, 55.)

SUMMARY OF ARGUMENT

I. The contract of carriage here involved was not one for the incidental transportation by respondents of the personal baggage of a passenger; instead the contract was one for the transportation of goods for hire, unrelated to the carriage of a passenger.

II. The implied representation of a passenger to a passenger carrier respecting the contents of a trunk to be carried as an incident to the transportation of a passenger does not apply to the case of a contract with a transfer company who, as a carrier of goods for hire, undertakes to carry a trunk as merchandise, and not as an incident to the transportation of a passenger.

III. The word "baggage" means one thing when employed to designate a trunk carried by a carrier of goods for hire, and a different thing when employed to designate a trunk carried by a carrier of passengers as an incident to the transportation of the passenger.

IV. The carrier of goods for hire may not, even by contract, limit its liability for the full value of the shipment entrusted to it, without giving to the shipper, whether of a trunk or sample case or other goods, notice of the

carrier's limited liability, and a choice of rate differentials, if such it have. Hence, no limitation results from the mere silence of the shipper, unasked by the carrier.

V. There was no fraud of the shipper, either proven or found.

ARGUMENT

Respondents' brief fails utterly to refute petitioners' proposition of law that it is not the duty of the shipper, in the absence of inquiry by the carrier, to inform the common carrier of goods for hire of the value of the goods the carrier undertakes to carry, and that mere silence of the shipper, therefore, does not constitute fraud on the shipper's part.

Indubitably the English and American rule is that it is not the duty of the shipper to initiate action, or take steps, to limit the carrier's liability to less than full value; instead the duty of initiating action, and taking steps, to limit its liability is that of the carrier.

In their petition for a rehearing, filed in the Circuit Court of Appeals, petitioners have set forth excerpts from many of the cases cited in our original brief filed in this court, stating the foregoing as the correct rules of law. (R. 133-152.) The court may find it helpful to read such excerpts.

The respondents undertake to escape the effect of these rules of law by urging factual considerations contrary to, and not sustained by, the record.

NATURE OF THE CONTRACT HERE INVOLVED

Throughout their brief the respondents repeatedly assert the fact to be that the receipt or claim check given by respondents to petitioners' agent was labeled "baggage" (p. 2, l. 7; p. 4, l. 12; p. 9, l. 11); and they assert that the District Court made a finding to that effect (p. 7, l. 25). Upon these two false assumptions of fact, respondents

argue that the express contract of carriage here involved was one in which the subject-matter was "baggage" in the limited sense of personal baggage, and that articles of jewelry are not within the purview of such contract of carriage.

In no manner is such receipt (Exhibit A, R. 18) labeled "baggage" as claimed by respondents in their brief. Such receipt, ostensibly that of respondent Frank Bird Transfer Company, does not even contain the word "baggage" except in conjunction with a telephone number printed thereon where the words Frank Bird or Yellow Baggage are given as the companies to whom the telephone number applies.

The representative of respondents who, for the respondents, made and entered into the contract for the transportation of the trunk in question testified, on cross-examination, that the shipper's agent gave the respondents' such agent a claim check for a trunk, and told him, and told him only, that he wanted his trunk sent to the Claypool Hotel. (R. 53.) No questions were asked and no statements were made respecting the nature of the trunk or its contents or the value of its contents.

Mr. Kackley, secretary and treasurer of the respondents, stated that the respondents were engaged in the business of transporting trunks and baggage from the Union Station to downtown hotels and, as a part of its baggage transfer business, transported trunks for commercial travelers from the Union Station to downtown hotels. (R. 49-50.)

Mr. Pinkston, the dispatcher for the respondents, testified that the Frank Bird Transfer Company hauled and transported trunks and sample cases for commercial

travelers from the Union Station to downtown hotels. (R. 52.)

Such evidence, in no wise contradicted, does not establish, or tend to establish, the making of a contract with respondents for the transportation of the trunk in question as "baggage" in the limited sense of the personal effects of a passenger; nor did the District Court find that any such contract was made with respondents.

It is hardly necessary to point out that the implied representation to the railroad company, over whose line of railroad the shipper's agent came to Indianapolis, arising in virtue of the passenger and carrier status obtaining between the shipper's agent and the railroad company, did not extend to the respondents as transfer companies to whom the shipper's agent presented his railroad claim check to enable the respondents as transfer companies to obtain possession of the trunk from the railroad company at the Union Station.

One who contracts with a transfer company for the transportation of his trunk at an office of such transfer company located at a railroad station, by presenting to such transfer company a railway baggage claim check for the purpose of enabling the said transfer company to obtain possession of such trunk from the railroad company, does not thereby enter into a contract with the transfer company for the carriage of such trunk as "baggage" in the limited sense of the term to denote "passenger baggage."

McQuat v. Cook's Taxicab & Transfer Co. (Wis.), 176 N. W. 763, 764;

Stanfield v. Frank Parmelee Co., 223 Ill. App. 199;

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 355;

Parmelee v. Lowitz, 74 Ill. 116.

Thus in *McQuat v. Cook's Taxicab & Transfer Co.* (Wis.), 176 N. W. 763, 764, the court said:

> "We appreciate the argument that the transfer company and the owner of the baggage should be held to intend, as an implied term of their contract, that the baggage tendered for transportation is such as a passenger may carry on the train and for which he may recover in the event of loss. It is forcefully presented. We, however, reach the conclusion that such term should not be imported into the contract."

The Wisconsin court, in the cited case, further held and said:

> "But for the relation between carrier and passenger incidental to which baggage is carried there would not be a limitation of liability."

In the case at bar there existed no carrier and passenger relation.

The case of *Wiener v. Campagnie Generale Transatlantique*, 61 Fed. (2d) 893, cited and relied upon by the respondents, is not in point. The facts in that case were that the parties had contracted for the transportation of the property as "baggage," and the record on appeal in that case disclosed that the plaintiff and the defendant entered into a contract to carry plaintiff's goods from New York to Paris as "baggage."

In the cited case the baggage was destroyed while on the passenger train between Havre and Paris at a time

when the plaintiff was not a passenger on the train. The plaintiff sued to recover for the loss of "baggage."

The language of the court which counsel opposed have quoted in their brief is an answer to respondents' contention in this case. Clearly what was meant by the court in the cited case by the language quoted by respondents in their brief was that the defendant's responsibility as an insurer would be limited in that case to property classified as "baggage" inasmuch as the plaintiff in the cited case, by his pleadings, was only claiming and suing for the loss of his "baggage."

The Indiana cases cited by respondents were distinguished by us in our original brief from the case at bar.

Clearly there is no contract here, either express or implied, either proven or found, for the carriage of the trunk as the personal baggage of a passenger.

CONNOTATIONS OF THE WORD BAGGAGE

That the term "baggage" means one thing when employed to describe property being transported as an incident to the transportation of the owner as a passenger and another thing when employed to describe property being transported independently of, and apart from, the transportation of the owner as a passenger, is fully recognized by the authorities.

In *Stanfield v. Frank Parmelee Co.*, 223 Ill. App. 199, the court said:

> "The word 'baggage,' it will be seen, has two connotations. It means one thing when used to describe articles transported in a trunk by a railroad as an incident to the transportation of their

owner, and another thing when used to describe articles transported in a trunk or box or other receptacle unrelated to the transportation of their owner, by a transfer company for a specified compensation."

To the same effect are:

Morgan v. Woolverton, 203 N. Y. 52, 96 N. E. 354, 355;

Atlantic Coast Line R. Co. v. Campen Bros. Co. (Fla.), 154 So. 131, 133;

Parmelee v. Lowitz, 74 Ill. 116;

McQuat v. Cook's Taxicab & Transfer Co. (Wis.), 176 N. W. 763, 764;

Hannibal & St. Joseph R. R. Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423, 429.

HOW LIABILITY OF A COMMON CARRIER OF GOODS MAY BE LIMITED

Since the undisputed evidence is that the respondents, as a part of their transfer business, transported trunks and sample cases for commercial travelers and traveling salesmen to and from the Union Station to and from downtown hotels in the City of Indianapolis at and prior to the time of the loss here involved, (R. 50-52) it would be absurd to say that respondents, as common carriers of goods for hire, engaged in transporting baggage, including salesmen's trunks and sample cases, may limit their liability to the loss of such property only as may be personal "baggage," merely by refraining from making any inquiry respecting the nature or value of the thing tendered to them for transportation.

It is elementary that the carrier of goods for hire may not by contract, limit its liability without giving to the shipper, whether of a trunk or sample case or other goods, notice of the carrier's limited liability, and a choice of rate differentials, if any it have.

The logic of the rule requiring common carriers to limit their liability by contract with, or notice to, the shipper in order to avoid full responsibility as an insurer, was recognized by this court in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 S. Ct. 151, at page 155, where this court said:

> "This is reasonable, because he can always guard himself by a special acceptance, or by insisting on being informed of the nature and value of the articles before receiving them."

To impose upon respondent's customers any limitation of liability of respondents under the circumstances of this case would be tantamount to incorporating a term and condition into the contract of carriage which the parties themselves did not make.

Surely under the circumstances of this case the logical and applicable rule requires that if the carriers of goods would limit their responsibility, they must do so by contract with, or upon notice to, their customers, and having failed to do so, their common law liability exists. This view was forcefully stated by the Illinois Supreme Court in the case of *Parmelee v. Lowitz*, 74 Ill. 116, as follows:

> "The latter rule seems to be the more reasonable for it may well be assumed that travelers, generally, are not familiar with the nice distinction between railroad baggage on the one hand and ordinary baggage on the other, whereas the transfer com-

pany, conducting its business as a common carrier for private profit and fixing its own charges for its services, if desirous of complete knowledge in order to limit its liability and determine the necessity for making an extra charge, may properly inquire of the owner to any extent it sees fit as to the nature of the property offered for transfer, and then, with its eyes open, act in the matter."

Rosenfeld v. The Peoria, Decatur and Evansville Ry. Co., 103 Ind. 121, 125, cited by the respondents, squarely announces the petitioners' proposition that respondents may not enforce any limitation of their common law liability without showing that the shipper had knowledge of it, or that his statements or conduct justified the carrier in limiting its liability. In that case, the Indiana Supreme Court held that the burden was upon the carrier clearly to show that his liability had been limited and that all such contracts would be interpreted most strictly against the carrier. In the last cited case the court said:

"Another rule of law, that seems to be settled by the weight of authority, is that if the carrier claims that, by contract or the misconduct of the shipper, his common law liability has been limited, the burden is upon him to clearly show it, and all such contracts will be interpreted most strictly against the carrier.

"In the case of *St. Louis, etc., R. W. Co. v. Smuck, supra*, this court said: 'But, in our opinion, contracts not clear in their meaning, by which common carriers seek to avoid the responsibility which the law imposes upon them as such, should be construed most strongly against them.' *Indianapolis, etc., R. R. Co. v. Cox*, 29 Ind. 360; Lowson Contracts of Common Carriers, Sections 135, 246, and cases there cited. And so, too, that carriers may, by fixing

> value, limit this common law liability, it must be shown that the shipper had some kind of knowledge of such fixing of value, and for a sufficient consideration consented thereto, or that his statements or conduct justified the carrier in so fixing the value, as we have before stated."

Such also is the statutory rule in Indiana. Sec. 55-1402, Burns' Ind. Stat. Anno. 1933.

THERE IS NO FRAUD FOUND OR PROVEN

Emphasis in respondents' brief is placed upon alleged constructive "fraud" arising out of the shipper's omission, unasked, to reveal the contents of the trunk in question.

As the first step in spelling out such supposed fraud, respondents again indulge in the misstatement that the District Court found that the respondents were misled by the conduct of petitioners' agent under the circumstances of this case (Respondents' Brief, p. 15, l. 12). The special findings of fact reveal no such finding, and in fact come no closer to such a finding than to hold in the negative the respondents had no knowledge of the contents of the trunk in question.

In support of their fraud theory, respondents rely chiefly upon the decision in *Nathan v. Woolverton*, 127 N. Y. S. 442, in support of their proposition that mere silence will spell out fraud. But as pointed out in petitioners' original brief herein, the decision in *Nathan v. Woolverton*, 127 N. Y. S. 442, is not the law in the State of New York upon this proposition because of the decision of the Court of Appeals of New York in *Morgan v. Woolverton*, 203 N. Y. 52. Respondents, however, persist in their contention that the case of *Nathan v. Woolverton*, 127 N. Y. S.

42, represents the law of the State of New York upon the proposition, and they cite two later cases as approving that case, namely: *Robin v. Colazzi*, 166 N. Y. S. 978, and *Water v. Bean Site Company*, 186 N. Y. S. 731. The attention of this court need not be called to the fact that the Court of Appeals of New York, which decided the case of *Morgan v. Woolverton*, 203 N. Y. 52, 96 N. E. 354, 355, is the court of last resort in the State of New York, whereas the Appellate Division, the Appellate Term, and the City Court, which decided the cases cited and relied upon by respondents, are all inferior in jurisdiction to the Court of Appeals of New York. Therefore, since the Court of Appeals of New York, in *Morgan v. Woolverton*, 203 N. Y. 52, 96 N. E. 354, 355, permitted a recovery of $1,200.00 for the loss of the contents of a trunk in a holding which limited the definition of "baggage" to those cases where there was present the essential relation of baggage to the transportation of the person who owned it, the principle of that case must be taken as the New York law. See also *Gorham Manufacturing Company v. Fargo*, (N. Y.) 45 How. Prac. 90, 92.

There being no finding of deceit or intent to deceive, or of artifice used to conceal the true nature of the contents of the trunk in suit, petitioners cannot be charged with fraud under the authorities heretofore cited in their original brief and in their reply brief herein.

As was said in Williston on Contracts, Vol. 2, Section 1110 (1920),—

> "the carrier can hardly assert that it has been deceived unless it makes inquiry of the shipper in regard to the value of the goods, or unless the exterior appearance of the goods is such as to

amount to a representation that they are different in kind or value from what is actually the case."

Petitioners respectfully submit that their petition for a writ of certiorari herein should be granted.

Respectfully submitted,

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